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RE TONG TAI HOLDINGS SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING
ZAKARIA SAM JC
[ORIGINATING SUMMONS NO: 24-378-2001-11I(II)]
31 MARCH 2003

b

CIVIL PROCEDURE: *Representative action - Requirements - Whether plaintiff had capacity to bring such action - Whether plaintiff only suing in its representative capacity for other co-proprietors - Whether plaintiff had proper authority to act on behalf of other co-proprietors*

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The plaintiff filed an application under O. 15 r. 12(1) of the Rules of the High Court 1980 ('RHC') for recovery of certain land under O. 89 of the RHC. The defendants raised three preliminary objections, namely that: (1) O. 89 r. 3 of the RHC had not been complied with; (2) the alleged plaintiff was not properly represented herein; and (3) the affidavit filed in support of this application merely supported and represented the interest of the plaintiff. The main issue of contention was whether or not the plaintiff had the capacity to bring this action.

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Held:

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[1] The plaintiff in a representative action must state clearly in the summons and statement of claim that the action was taken up on behalf of themselves and on behalf of the others. There was no indication that the plaintiff brought this action on behalf of itself as well as on behalf of the other co-proprietors. It was clear that the plaintiff was not suing on its behalf, but only in its representative capacity, *ie*, for the benefit of the other co-proprietors. Therefore, the capacity upon which the plaintiff was suing was not clearly stated in this action. The affidavit in support of this application did not reveal whether or not the plaintiff had been duly appointed to commence this action as a representative for and on behalf of all the other registered co-proprietors. As such, the plaintiff had no proper authority to act on their behalf. In the circumstances, the defendants' preliminary objections were upheld and the application set aside with costs.
(pp 173 c-f & 174 a-d)

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[Ordered accordingly.]

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Case(s) referred to:
Duke of Bedford v. Ellis [1901] AC 1 ***(foll)***
Jok Jan Evong & Ors v. Marebong Lumber Sdn Bhd & Ors [1990] 2 CLJ 625; [1990] 2 CLJ (Rep) 169 HC ***(refd)***

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Market & Co Ltd v. Knight Steamship Co Ltd [1910] 2 KB 1021 ***(refd)***
Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors [2001] 2 CLJ 769 HC ***(refd)***
Palmco Holding Bhd v. Sakapp Commodities (M) Sdn Bhd & Ors [1988] 2 MLJ 626 ***(foll)***
Smith & Ors v. Cardiff Corp [1954] 1 QB 210 ***(refd)***
Voon Keng & Ors v. Syarikat Muzwina Development Sdn Bhd [1990] 1 CLJ 1010; [1994] 3 CLJ (Rep) 329 HC ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 6 r. 3, O. 15 r. 12(1), O. 89 r. 3

For the plaintiff - John Shek; M/s Sheck & Co
For the defendants - Cheng Hui Hong (See Chee How); Cheng & Cheng

Reported by Suresh Nathan

JUDGMENT

Zakaria Sam JC:
This is an application filed by the plaintiffs under O. 15 r. 12(1) of the Rules of the High Court, 1980 (RHC) for the recovery of land under O. 89 RHC.

At the outset of the hearing of the application, the defendants raised three preliminary objections, namely:

(i) that O. 89 r. 3 RHC has not been complied with;

(ii) that the alleged plaintiffs are not properly represented herein;

(iii) that the affidavit filed in support by one Mr. Hoan Siew Choo @ Fan Siew Choo (BIC.K 480209) dated 13 November 2001 is at the best merely supporting and representing the interest of M/s Tong Tai holdings Sdn Bhd holding only 277/800ths undivided share in Lease of Crown Land No. 1951 and 349/800ths undivided share in Lot 2170 Block 59 Muara Tuang Land District respectively.

The plaintiffs on the other hand, disputed the mode of the defendants' objections which was done by way of preliminary objection. The plaintiffs contended that the merits of their case should be answered by the defendants through an affidavit-in-reply instead of by way of preliminary objections. The plaintiffs urged the court to dismiss the preliminary objections as wrong procedure was adopted by the defendants.

On 28 March 2002, I allowed the defendants to proceed with the preliminary objections as the issues raised were issues of law and not facts. The defendants

need not file any affidavit-in-opposition if the issues raised in the preliminary objections could conclusively determine this action.

I shall now examine the defendants' objections.

Since the three preliminary objections are inter-related, I will consider all of them together.

The Law

Representative action is provided under O. 6 r. 3, O. 15 r. 12(1) of the Rules of the High Court, which reads:

O. 6 r. 3:

(1) Before a writ is issued it must be indorsed:

(a) where the plaintiff sues in a representative capacity, with a statement of the capacity in which he sues;

(b) where a defendant is sued in a representative capacity, with a statement of the capacity in which he is sued.

(2) Before a writ is issued in an action brought by a plaintiff who in bringing it is acting by order or on behalf of a person resident outside the scheduled territories it must be indorsed with a statement of that fact and with the address of the person so resident.

O. 15 r. 12(1):

Where numerous persons have the same interest in any proceedings, not being such proceedings are mentioned in rule 13, the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any or more of the defendants or other persons as representing whom the defendants are sued to represent all, or all except one or more, of those persons in the proceedings; and where, in exercise of the power conferred by this paragraph, the Court appoints a person not named as a defendant, it shall make an order under rule 6 adding that person as a defendant.

The law pertaining to representative action is well settled. In the case of *Duke of Bedford v. Ellis* [1901] AC 1, it was held that in order to succeed in a representative action, the plaintiff must satisfy three requirements. Firstly, the plaintiff and those represented by it are members of a class and that these members have a common interest. Secondly, the plaintiff and those represented have a common grievance. Thirdly, the relief sought is in its nature beneficial to them all. This decision was followed with approval by our courts in *Palmco Holding Bhd v. Sakapp Commodities (M) Sdn Bhd & Ors* [1988] 2 MLJ 626

and *Voon Keng & Ors v. Syarikat Muzwina Development Sdn Bhd* [1990] 1 CLJ 1010; [1994] 3 CLJ (Rep) 329, to name a few.

In *Duke of Bedford*'s case (*supra*), the plaintiffs had sued, on behalf of themselves and all other growers of fruits, flowers, etc. In *Smith & Ors v. Cardiff Corp* [1954] 1 QB 210, the four tenants sued on their behalves and that of the other tenants that the increment of the rent was *ultra vires*. In *Market & Co Ltd v. Knight Steamship Co Ltd* [1910] 2 KB 1021, the plaintiffs sued on behalf of themselves and 44 other persons, firms and companies who had shipped goods on board of a ship and both the ship and cargo were sunk.

It is very clear, therefore, that besides fulfilling the three preconditions as stipulated in *Duke of Bedford*'s case, the plaintiff in a representative action must state clearly in the summons and statement of claim that the action was taken up on behalf of themselves and on behalf of the others.

It is not in dispute that the plaintiffs are one of the registered co-proprietors of the land. However, the main issue facing the court is the capacity of the plaintiffs in bringing this action. Is this action filed by the plaintiffs on behalf of themselves and the other co-proprietors or just on behalf of the other co-proprietors? To answer this question, one needs to look at the title in this originating summons. The plaintiffs herein are described as "Tong Tai Holdings Sdn Bhd (in their representative capacity for the benefit of the other co-proprietors ...)." It was not indicated anywhere in this originating summons that the plaintiffs brought this action on behalf of **themselves as well as on behalf of the other co-proprietors** (emphasis added). Thus, it is clear that the plaintiffs are not suing on behalf of themselves. The plaintiffs are not exercising their own right here. The plaintiffs are suing in their representative capacity, ie, for the benefit of the other co-proprietors. In other words, the plaintiffs are merely acting on behalf of the other co-proprietors only.

The learned counsel for the plaintiffs submitted that the action had been properly constituted under O. 15 r. 12(1) Rules of the High Court 1980 and cited the cases of *Jok Jan Evong & Ors v. Marebong Lumber Sdn Bhd & Ors* [1990] 2 CLJ 625; [1990] 2 CLJ (Rep) 169 and *Nor Anak Nyawai & 3 Ors v. Borneo Pulp Plantation Sdn Bhd & 2 Ors* [2001] 2 CLJ 769 to support his argument. With due respect, the facts of these two cases do not support his proposition. In both cases, it must be noted that all the members of the alleged class have a common interest, ie, that all have a common grievance and that the relief is in its nature beneficial to them all. Both the actions were brought on behalf of the plaintiffs and the others.

For the reasons as stated above, I must agree with the defendants' contention that the capacity upon which the plaintiffs are suing is not clearly stated in this action.

The next question concerned the *locus standi* of the plaintiffs in filing this action on behalf of the other co-proprietors.

The affidavit of Hoan Siew Choo @ Fan Siew Choo, the chairman of the plaintiffs, in support of this application, did not reveal either he or the plaintiffs had been duly appointed to commence this action, as a representative for and on behalf of all other registered co-proprietors (including the late Tan Sri Ong).

There is also no evidence adduced to show that no letters of administration had been obtained or warrant to act or consent given to the plaintiffs to commence this action on behalf of the estate of the late Tan Sri Ong.

As such I found that the plaintiffs have no proper authority to act for and on behalf of all other registered co-proprietors as well.

In the circumstances, the defendants' preliminary objections are upheld and the originating summons is hereby set aside with costs.